84-1889

NO.

Supreme Court, U.S.
FILED
JUN 4 1985
ALEXANDER L. STEVAS,
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1985

GLENDA MERWINE

Petitioner

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL,

Respondant

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

NUMBER 84-4036

Decided March 8, 1985

Reported in 754 F2d 631

George McKee
Attorney at Law
P.O. Box 1305
Starkville, Ms. 39759
Counsel for Petitioner
(601) 323-8508

Jim Waide
Attorney at Law
P.O. Box 1075
West Point, MS. 39773

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

27pp

IN THE SUPREME COURT
OF
THE UNITED STATES

GLENDA MERWINE

Petitioner

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTION
OF HIGHER LEARNING, ET AL

Respondent

QUESTION PRESENTED FOR REVIEW

I.

Was the Fifth Circuit Court of Appeals correct in applying a clearly erroneous standard of review to an implied finding of fact, but refusing to review the legal correctness of the underlying opinion from which the implication was drawn?

II.

Does the challenged requirement in this Title VII case, the American Library Association Accredited Master of Library of Science Degree, bear a manifest relationship to the employment in question as claimed by the Defendants, and is it a business necessity?

III.

Did the plaintiff make out a *prima facie* case of disparate impact under Title VII of the Civil Rights Act of 1964?

TABLE OF CONTENTS

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Reported 1

Jurisdictional Grounds 2

Statutes Involved in the Case 2

Statement of the Case 3

Basis for Federal Jurisdiction 8

Argument 8

I. Burden of Proof 8
II. Business Necessity 12
III. Impact of the ALA-MLS Requirement 16

Summary 20

TABLE OF AUTHORITIES

Carpenter v. Stephen F. Austin Univ.
706 F2d 608 (5th Cir. 1983) 16

Civil Right Act of 1964, Sec. 2000e-2(a) 2, 8, 14

Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525,
73 L.Ed. 2nd 130 (1982) 5, 13

Dothard v. Rowlinson 433 U.S. 321, 97 S.Ct.
2720, 329, 53LEd2d 786 (1977) 16, 19

Griggs v. Duke Power Co. 401 U.S. 424, 91 S.Ct.
849, 28 L.Ed. 2nd 158 (1971) 13

Johnson v. Goodyear Tire and Rubber Co.
491 F2d 1364 (5th Cir. 1974) 9, 16

Merwine v. Board of Trustees, et al
754 F2d 631 (1985) 8, 9, 12, 14
Parson v. Kaiser Aluminum and Chemical Corp.
575 F2d 1374 (5th Cir. 1978) 9

Smith v. Olin Chemical Corporation 555 F2nd 1283
(5th Cir. 1977) 13

Uniform Guidelines on Employee Selection Procedures,
29CFR Sec. 1607 et seq. (1978) 19

IN THE SUPREME COURT
OF
THE UNITED STATES

GLENDA MERWINE,

Petitioner

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL

Respondent[1]

OPINIONS REPORTED

The United States District Court for the Northern District of Mississippi, Magistrate Charles M. Powers, presiding, rendered its memorandum decision in this cause on the 29th day of December, 1983. A complete copy of the memorandum decision is included in the appendix to this brief.

---

[1] Glenda Merwine, Plaintiff-Appellant, brought suit in the United States District Court for the Northern District of Mississippi against Mississippi State Univeristy and the Board of Trustees for State Institutions of Higher Learning and individual defendants James D. McComas, President of Mississippi State University; George Lewis, Library Director of Mississipi State University; and James G. Miller, Dean of the College of Veterinary Medicine at Mississippi State University. All individual defendants were dismissed by the Trial Magistrate and Plaintiff does not challenge their dismissal in this Petition.

Plaintiff believes the disparate impact portion of this case, i.e., whether requiring the American Library Association accredited Master of Library Science degree as a minimum employment qualification unlawfully discriminated against her on the basis of her sex, is of extreme importance to the library profession and universities, nationwide. The American Library Association apparently feels similarly because it made an appearance before the Fifth Circuit Court of Appeals through its attorneys, James S. Whitehead and Mary Hutchings Reed.

The United States Circuit Court of Appeals for the Fifth Circuit rendered its opinion on March 8, 1985 styled *Glenda Merwine, Plaintiff-Appellant versus Board of Trustees for State Institutions of Higher Learning, et al, Defendants-Appellees,* 754 F2nd 631 (1985).

JURISDICTIONAL GROUNDS

Review is sought of the opinion from the United States Circuit Court of Appeals for the Fifth Circuit rendered in this case on March 8, 1985. No petition for rehearing has been filed with that Court and petition for Writ of Certiorari is brought directly to the United States Supreme Court under the authority of Title 28 USCA Section 2101(c).

STATUTES INVOLVED IN THE CASE

Civil Rights Act of 1964, Section 701 et seq., 42 USCA Section 2000e-2 (a)

(a) It shall be an unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privilages of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversly affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Plaintiff petitions for review of the findings of the Fifth Circuit Court of Appeals as they relate to her claim that a facially neutral requirement, the American Library Association Accredited Master of Library Science Degree, unlawfully deprived her of an employment opportunity with the defendant, Mississippi State University.

STATEMENT OF THE CASE[2]

Plaintiff, Glenda Merwine, a Librarian, accompanied her husband to the State of Mississippi where he enrolled in the College of Veterinary Medicine at Mississippi State University. Prior to moving to Mississippi, Mrs. Merwine had achieved nine hours toward an ALA Accredited Master of Library Science at Fresno State University in the State of California. There being no American Library

---

[2] Plaintiff chooses not to petition for review of the findings of the Court of Appeals on the question of disparate treatment. Plaintiffs disparate impact claim, i.e. , whether the requirement of an ALA-MLS degree as a minimum qualification for employment unlawfully discriminated against Plaintiff because of her sex, speaks to basic American precepts of fair play that are protected by Title VII, the spirit of the U.S. Constitution and court precedents. The precept, for example, that a person should be considered based on her knowledge, skills and abilities, not on how she acquired them and the precept that if an employer chooses to place more importance on how skills are acquired, rather than on what skills are possessed, then that employer should be prepared to expound a *substantive* reason for doing so. Plaintiff possessed the knowledge, skills and abilities for the position for which she applied. She was rejected because she did not obtain these skills at a library school accredited by the American Library Association. Female librarians frequently find themselves in similar circumstances as Plaintiff. Male librarians infrequently find themselves in similar circumstances. The final question before the Court is, "is it necessary to discriminate against a woman in this manner?"

Association Accredited Master of Library Science Degree (ALA-MLS) offered within the confines of the State of Mississippi, Mrs. Merwine continued her education by obtaining the available alternative, a Masters Degree in secondary education with specialty in Library Science from Mississippi State University. This degree was equivalent in all respects to the American Library Association Accredited Master of Library Science Degree, but was not accredited by the American Library Association.

Plaintiff sought in May of 1980 an appointment as Librarian for the College of Veterinary Medicine at Mississippi State University. Plaintiff completed her masters program in August of 1980 at about the same time the successful male applicant was hired. Candidates in the process of obtaining the challenged qualification, the ALA-MSL, were considered.

Having been rejected in favor of a male applicant whom she deemed to be lesser qualified than herself, Plaintiff brought suit alleging, *inter alia* that a facially neutral requirement, the American Library Association Accredited Master of Library Science Degree (hereinafter referred to as ALA-MLS) which was used as justification for her non-selection, had an adverse impact on women applicants for the position and bore no manifest relationship to the employment in question. Plaintiff's case rested on stipulated statistical data establishing that prior to implementation of the requirement in 1978, eighty nine percent (89%) of male applicants for professional librarian positions at Mississippi State University possessed an ALA Accredited Master of Library Science Degree while on fifty four percent (54% of female applicants for those same professional librarian positions possessed the ALA-

MLS, and that for the particular job being sought, one hundred percent (100%) of the male applicants had the ALS-MLS while only sixty-nine percent (69%) of the females had it.

The United States District Court for the Northern District of Mississippi, Magistrate Charles M. Powers presiding, ruled that the Plaintiff had not made a **prima facie** case of disparate impact.[3] No ruling whatever was made by the Magistrate with regard to the question of business necessity. Plaintiff appealed to the United States Circuit Court of Appeals for the Fifth Circuit contending that the Magistrate erred by (a) restricting the applicant pool to only those librarians possessing the challenged requirement, the ALA-MLS, and (b) by segmenting the statistical data so as to fashion an inappropriate result and (c) by not applying the holding of the U.S. Supreme Court in *Connecticut v. Teal* 457 U.S. 440, 102 S.Ct. 2525, 73 L. Ed 2nd 130 (1982) that and individual may object that an employment qualification used in making hiring decisions has a discriminatory impact even if the class in which she is a member has not been disproportionally denied employement.

In its opinion rendered March 8, 1985, the Court of Appeals for the Fifth Circuit refused to consider the Plaintiffs attack on the Magistrates finding that she had not made out a *prima facie* case, declining to state whether the Plaintiff or the Magistrate was correct on this point.

---

[3] The Magistrate concluded...

The Court accordingly concludes that Plaintiff has failed to establish a *prima facie* case of discrimination in hiring on the basis of sex in violation of Title VII because of utilization of the ALA-MLS requirement by MSU for the position of Branch Librarian at the College of Veterinary Medicine in 1980. See Appendix.

The Court of Appeals did, however, go on to infer that the Magistrate had implied in his Opinion that the ALA-MLS degree was a business necessity. In fact, no such implication was made by the Magistrate, for he never reached the issue of business necessity. Treating this inference as being tantamount to a finding of fact by the District Court, the U.S. Court of Appeals for the Fifth Circuit then applied a clearly erroneous standard of review to the implied find of fact that the ALA-MLS degree was a business necessity.

At the trial, both sides presented extensive expert testimony. The Plaintiff presented Glen Zimmerman, Associate Librarian for Management, the Library of Congress, who testified

> ...it is my professional opinion that the ALA accredited degree is not a valid minimum educational qualification. And I base that opinion, basically, on the same reasoning process that the library of Congress had to use. And that is, going back to the purpose of a minimum qualification, if it is valid, it is supposed to be a predictor of success in a postion.
>
> If the position in question were posted with the ALA-MLS degree, then that in effect is stating that nobody without that degree can perform that work. And if they actually have staff members on their staff, in the library, doing that work and doing it satisfactorily, then the issues are at odds. [T-371].

Plaintiff also presented the late Stephen Bemis[4] who testified

> ...having conducted four to five hundred validation studies on a wide range of occupations, I do not see how that requirement could be valid.
>
> Perhaps I might explain a little bit. The number of stipulations that have been made indicate that there appear not to be differences in performance of people on the job favoring those with the degree requirement. And in fact, perhaps there are differences in the other direction.
>
> But the essence of a statistical validation would be to show that those people who have the degree requirements are better performers on the job. And as I understand the stipulations, it is just the opposite that has been stipulated.[T-232]

This case has generated considerable discussion in the community of librarians, nationwide. The impact of the opinion of the Fifth Circuit Court of Appeals will be immense to those librarians who, like the plaintiff, are competent, but do not possess that all important seal of approval by the American Library Association.

---

[4] Mr. Steven Bemis, at the time of his testimony, was Vice-President of Psychological Service, Inc. He testified that his firm specialized in assessment of people in the area of tests, background statements, performance appraisal, and also statistical aspects of validation [T-211]. Mr. Bemis testified that he authored the four fifths rule of thumb when he was employed by the office of Federal Contract Compliance. The four fifths rule of thumb is currently employed by the Uniform Guidelines on Employee Selection Procedures as a quantitative measure of adverse impact.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction was conferred on the U.S. District Court of the Northern District of Mississippi and the U.S. Court of Appeals for the Fifth Circuit by virtue of the U.S. Constitution, Amendment Fourteen, 28 U.S.C.A. 1343 and 28 U.S.C.A.1331 and 42 U.S.C.A. 1983 and by virtue of Title VII of the Civil Rights of 1964, 42 U.S.C.A. 2000(e), et seq. This Petition is limited to issues arising under the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-2(a), et seq., as it pertains to Plaintiffs claim that a facially neutral standard, the ALA-MLS, unlawfully deprived her of an employment opportunity with the Defendant, Mississippi State University.

ARGUMENT

I. *BURDEN OF PROOF*

The trial magistrate held only that Plaintiff had not shown a *prima facie* case of disparate impact. That was the extent of the trial courts holding on disparate impact. Plaintiff disputed the legal correctness of the trial courts interpretation of the facts and filed her appeal explaining at length, why there was in fact a statistical case of disparate impact. The Fifth Circuit Court of Appeal refused to consider whether plaintiff had or had not made out a *prima facie* case, moving directly to the issue of business necessity. It declined to address the issues raised by both parties concerning the relevant statistical labor pool to be addressed.[5]

---

[5] Plaintiff had contended that the relevant labor pool included all librarians with the knowledge, skills and ability to perform the job in question. Defendants contended that the relevant labor pool consisted

At this point, however, the Fifth Circuit Court of Appeals radically departed from the accepted burden of proof established by the United States Supreme Court. For, instead of requiring the Defendants to prove that the ALA-MLS degree was a business necessity, they inferred that the trial court had so found and then required the Plaintiff to attack that finding is clearly erroneous.

The Fifth Circuit Court of Appeals, itself, has repeatedly ruled that the clearly erroneous standard of review does not apply to findings of fact premised on an erroneous view of controlling legal principles. *Johnsons v. Uncle Ben's, Inc.*, 628 F2nd 419 (5th Cir., 1980); *Parson v. Kaiser Aluminum and Chemical Corp.* 575 F2nd 1374, 1382 (5th Cir. 1978); *Johnson v. Goodyear Tire and Rubber Co.*, 491 F2nd 1364, 1372 n. 20 (5th Cir., 1974).

Yet, in this case at hand, the Fifth Circuit applied a clearly erroneous standard of review, but refused to even rule whether the finding of no *prima facie* case, from which its inference was taken[6], was premised on an erroneous view of controlling legal principles as claimed by Plaintiff. What is the difference between applying a clearly erroneous standard to an erroneous view of controlling legal

---

(footnote 5 continued)
only of those applicants who already possessed an ALA-MLS degree. In footnote 8 of the opinion of the Fifth Circuit court of Appeals, the Court stated..."We decline to address the issues raised by both parties concerning the relevant statistical labor pool to be addressed". 754 F2d page 639, Note 8.

[6] The Appeals Court stated, "...the magistrate's holding that Merwine failed to establish her disparate impact claim *impliedly included* the finding that the ALA-MLS degree had a manifest relationship to the employment in question at issue here. (footnote omitted) We decline to hold that this finding was clearly erroneous..." 754 F2nd, page 639.

principles, on the one hand, and applying it to an implied finding of fact after refusing to rule, on the other hand, whether the underlying finding of fact from which that implication was drawn, was based on a correct view of controlling legal principles. There is no difference. The obvious conclusion is that the Fifth Circuit has *violated its own proscription* against improper use of the clearly erroneous standard of review.

The net effect of this device is that a Plaintiff now has the burden of showing both a *prima facie* case and also an additional burden of showing that the challenged requirment does not have a manifest relationship to the employment in question. Plaintiff is at a loss to understand why she was singled out for a heavier burden of proof on her disparate impact case than other plaintiffs have.

That the Court of Appeals required the Plaintiff to meet the improper burden of showing no business necessity is obvious from reading of the opinion. Although it was stipulated that "non ALA-MLS degree holders at Mitchell Memorial Library of Mississippi State University performed equally well as ALA-MLS degree holders at Mitchell Memorial Library,"[7] the court of appeals took the position that because Plaintiff did not show that *at entry level*, non ALA-MLS degree holders would perform equally as well, she had not met her burden of proof. The Court of Appeals disregarded the much more relevant question of whether Defendants had ever shown that ALA-MLS degree holders perform any better than anyone else *at any level.*

Nextly, the Circuit Court alludes to evidence in the record that

---

[7] Pre-trial order, Stipulation No. 41.

> ...an accreditation standard is particularly appropriate to insure not only that the appellant has received appropriate instruction and expertise but also that the institution from which the applicant graduated fulfills recognized, objective academic standards. 754 F2nd pages 639, 649.

The question is not whether ALA-MLS degree holders received appropriate instruction, but rather, whether there is any evidence that ALA-MLS degree holders receive instruction that was *more* appropriate than that received by other librarians. A rational examination of the evidence, without assumptions, indicates that they do not.

The Circuit Court then pegs their opinion on the fact that:

> ...Uncontested evidence indicates that approximately eighty percent (80%) of college and university libraries require that applicants for library faculty positions possess the ALA-MLS degree. 754 F2nd 640

Only eighty percent (80%)? What about the other twenty percent (20%) who apparently see no need to even advertise the requirement, much less require it. Does eighty percent make a manifest relationship? Ninety percent? One hundred percent? In Mississippi, in 1960, one hundred percent (100%) of public school districts insisted that there was a manifest relationship between skin color and educational opportunity.

Would a taxpayer have a defense against the C.I.R. if she proved that eighty percent of the other taxpayers were also underreporting their income?

II. *BUSINESS NECESSITY*

The experience at Mississippi State indicates that in fact, holders of the ALA-MLS degree may not perform as well as holders of other library degrees. There was uncontradicted testimony that those not possessing the ALA-MSL degree were promoted while some librarians with it were not.[8] This evidence certainly refutes the notion that the ALA-MLS degree is a business necessity. The Circuit Court dismisses the superior promotion record of non ALA-MLS Librarian by stating in the double negative:

> ...This testimony alone does not necessarily indicate that a business necessity does not exist for imposing the degree as a minimum educational requirement for entry level positions. 754 F2nd page 639, note 11.

---

[8] Mrs. Alice Sanford, accepted as an expert on Mitchell Memorial Library at Mississippi State University by the Court, testified:

Well, I guess you would say that the best way to compare them is to see if they get promoted. That would be one rule of thumb. And, as I just pointed out, Mrs. Rice has been promoted to the third ranking position in the Library. Mrs. Downy and Mrs. Betts are both department heads. Well, and Mrs. Irby, she is a department head.

Now, there are many others over there with ALA degress who were there when these people were hired who have not been promoted. And some of the people, I know, were promoted instead of some of those people.

So, I think these people have performed. I think the degree has made no difference in their work, in their performance in the library. [T-166]

In other words, before the Plaintiff's case can be considered, she first has to show that the challenged requirement is not a business necessity. No precedent can be found for this approach in any United States Supreme Court opinion nor in any opinion of the various Circuit Courts of Appeal.[9]

Next, the Circuit Court of Appeals alludes to, "testimony that on average the ALA accredited MLS degree holder, as opposed to the non-accredited degree holder, exhibits a noted superiority in reliability and dependability to the hiring libarary." The Circuit Court ignores the stipulation that ALA-MLS degree holders don't perform any better, but they give great credence to the self serving testimony of the Defendants president that ALA-MLS degree holders are somehow "just better", without saying why. This approach was tried by the company vice-president in the case of *Griggs v. Duke Power Company* and given no credence by the United States Supreme Court. Under the Circuit court rationale, there has been a new defense created, the "just better" defense.

Lastly, the ALA-MLS degree is defended by the Court of Appeals on the grounds that:

---

[9] *Griggs vs. Duke Power Company* 401 US 424, 91 S.Ct. 849, 28 L.Ed2nd 158. The Griggs rational has been affirmed by the U.S. Supreme Court as recently as 1982 in the case of *Connecticut vs. Teal*, 457 US 440, 102 S.Ct. 2525, 73 L.Ed.2nd 130. All Circuit Courts require that the Defendant prove business necessity. The only reported exception to this rule which could be found was from the Fifth Circuit Court of Appeals which, in 1977, ruled that in certain factual situations, business necessity need not to be proved. *Smith vs. Olin Chemical Corp.* 555F.2nd 1283, 15FEP 290 (1977).

> ...The university lacks the resources to properly insure that minimum standards are maintained in the selection of faculty personnel. 754 F2nd page 640

And that:

> ...Review by disinterested professionals of the institutions from which the applicants have graduated also insures the reliability of the quality of the sponsoring institutions' education programs. 754 F2nd 631, page 640

It is hard to truly envision a major state university defending an illegal employment practice on grounds that it does not have the resources to comply with the law. Congress expanded the law in 1972 specifically to cover universities[10] and the Fifth Circuit Court of Appeals has held that universities must comply with the law. Further, regarding the question of business necessity, Plaintiff should not have the burden of showing that the sponsoring institutions' educational programs are not reliable. Rather, the Defendant should have the burden of showing that graduates of the sponsoring institutions' educational programs do a better job than other librarians, regardless of their credentials. Due to the new burden of proof cast upon the Plaintiff by the Circuit Court, she has been placed in the position of proving that the ALA-MLS schools are not as good as others. This burden of proof is not only impossible, but there is no legal precedent for requiring it.

A rational analysis of the evidence on the issue of

---

[10] The Civil Rights Act of 1964 was specifically amended in 1972 to eliminate the exemption for non-religious educational institutions. 42 USCA 2000e-1.

business necessity of the ALA-MLS degree indicates that the entire case of the defendants is based on an assumption. That assumption was openly stated by their expert, Edward G. Holly, Dean of the School of Library Science at the University of North Carolina, an ALA accredited school, who stated:

> ...We have assumed, and I think rightly so, in American colleges and universities that the terminal degree, as defined in each individual field, is self validating for faculty positions. In the case of the library profession, it is a Masters Degree. And increasingly we are requiring additional training beyond that. [T-678]

Dr. Holly apparently applied the "self validating" concept to the ALA-MLS degree. No precedent can be found in the United States Supreme Court or any of the Circuit Courts of Appeal for an assumption of "self validation." Indeed, the entire thrust of civil rights law, to date, has been to abrogate the assumptions that society has imposed on itself and to force public institutions to make their decisions based on the evidence at hand and not on prejudice. History is replete with examples where mankind has moved forward only after "self validating" assumptions have been laid aside. If Christopher Columbus had assumed that the world was flat, you might not be reading this brief. Conversely, if the Fifth Circuit Court of Appeals had not assumed that the ALA-MSL degree was "just better" you also might not be reading this brief.

As a final note on the issue of business necessity, there was not proof by Mississippi State University at all of validation in terms of the Uniform Guidelines on

Employee Selection Procedures 29 CFR Section 1607, *et Seq.* (1978). Heretofore, the Fifth Circuit had cited absence of such proof as a factor weighing against the defendant on business necessity. *Carpenter v. Stephen F. Austin University* 706 F2nd 608, 622 (5th Cir., 1983); *Johnson v. Goodyear Tire and Rubber*, 491 F2nd 1364, 1371 (5th Cir., 1974).

III. *IMPACT OF ALA-MLS REQUIREMENT*

As pointed out by the learned Magistrate,

> To establish a *prima facie* case of discrimination a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.[11]

In terms of the Supreme Courts qualitative definition, above, and the quantitative definitions propounded in the Uniform Guidelines on Employee Selection Procedures, the Plaintiff submits her statistical case of adverse impact.[12]

---

[11] *Dothard v. Rowlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed. 786, 797 (1977).

[12] One of the central issues in this case is "what makes one a librarian?" Plaintiff contends that a librarian is anyone with the knowledge, skills and ability to do the job of a librarian. It was stipulated that neither the defendants or the plaintiff was aware of any statistical data available on the percentages of male and female graduates from non-ALA accredited library schools. Even if such data were available, it would not be indicative of the total applicant pool because using such data would presuppose that one had to be a graduate from a library school in order to be a librarian. Plaintiff is a graduate of the College of Education at Mississippi State University and hence, would not be included in statistical data on library schools. Professor Sanford stated that since 1970, the Masters Degree program specializing in library science at Mississippi State University had graduated 160 people. 159 are women; one of them is a man. [T-184]

The claim of the Plaintiff that the ALA-MLS minimum educational requirement at Mitchell Memorial Library has a disparate impact on women applicants for professional librarian positions is substantiated primarily through the use of applicant flow data for the years 1971-77 and through applicant flow data for the job in question.

The years 1971-77 reflect a time period during which the ALA-MSL Degree requirement was not in effect by Mitchell Memorial Library and, thus, the applicant pool should be unbiased or unchilled with respect to the ALA-MSL minimum educational requirement.

For the period 1970 through 1977[13], 60 of 111 total female applicants for professional positions at Mitchell Memorial Library possessed the ALA-MLS Degree. For the same time frame, 84 out of a total of 94 male applicants for professional librarian positions possessed the ALA-

---

13 Plaintiff's expert statistician, Dr. Marvin J. Karson, compared applicant flow data prior to 1978 with applicant flow data after 1978. [T-283-288] In his analysis, Dr. Karson found:

> ...and, if fact, the statistical analysis that I did was to compare statistically the precentage, 60 to 111, the 54% of the females with the degree in the pre-data versus the 44 to 52 females the with degree, which is about 85%. So that statistically, the difference between 54% in the pre and 85% in the post is significant. And it is significant to a level of approximately less than one in six hundred. Again, highly significant. And, if fact, the only differences that I was able to observe statistically betweent he pre-data and the post-data was in the percentage of the females with the degree. That essentially those without the degree had been screened out by the requirement. And I believe that has been referred to as "a chilling effect." Because now the precentage of females with the degree is very close to the percentage of males with the degree. 89% versus 85% [T286-287]

MLS prerequisite.[14] From this data, it can be seen that 54% of the female applicants had the ALA-MLS for the relevant time period and for the same time period, 89% of the male applicants had the ALA-MLS Degree. It is evident, from this data, that a much smaller percentage of women applicants have the ALA-MLS degree. This effectively demonstrates the discriminatory nature of the ALA-MLS requirement and, together with additional statistical data presented establishes the *prima facie* case of the Plaintiff.

In addition to the applicant flow data, it was stipulated that for the period 1970 until the implementation of the ALA-MLS minimum educational requirement in 1978, 44 persons were hired for professional librarian positions at Mitchell Memorial Library, 36 of whom were women, only 7 of whom (19.4% had the ALA-MLS Degree. *Eight of the 44 hires were men, all of whom (100%)* had the ALA-MLS Degree. Thus, 19.4% of the women hired possessed the ALA-MLS Degree while 100% of the men had it. This data is significant because it means that if the ALA-MLS Degree requirement had been operant during this time frame, 29 women (80.6% of the total women hired) would not have been eligible for employment and would have been screened from consideration by the ALA-MLS requirement whereas *no men would have been affected.* In a different context, 29 of 44 persons hired during this time

---

[14] Pre-trial Order, Stipulation of Fact No's. 9 & 10.

Plaintiff's expert, Dr. Marvin J. Karson, testified that Plaintiffs sample was statistically significant at a level of "less than two chances in ten thousand that the difference would be due to chance." [T-282]

frame (66% of all persons hired in this time frame would not have been hired and *all of the non-hires would have been women*. This type of analysis is very illustrative of the tremendous impact of the ALA-MLS requirement has on women applicants for professional positions at Mitchell Memorial Library at Mississippi State University. It is further evidence of disparate impact under the qualitative definition propounded by the U.S. Supreme Court in *Dothard v. Rawlinson, supra.*

Another quantitative measure of adverse impact, as defined by the Uniform Guidelines on Employee Selection Procedures, is the rejection rate[15] for males and females. As we have seen, 51.4% of the female applicants and 88.8% of the male applicants for the years 1971 through 1977 possessed the ALA-MLS Degree. Thus, it can be seen that the rejection rate for female applicants in the relevant time frame would have been 48.6% based on the ALA-MLS requirement whereas the rejection rate for males would have been only 11.2%. This translates to a rejection rate for women that is *4.3 times higher than the rejection rate for men, had the ALA-MLS been the sole minimum educational requirement for the years 1971-1977.*

Finally, it should be noted that all the males employed in professional librarian positions at Mitchell Memorial Library possessed the ALA-MLS Degree and all of the non ALA-MLS professional employees are women[16] and that The College of Veterinary Medicine Library posi-

---

[15] Adoption of Questions and Answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures, Question and Answer No. 20 contained in Federal Register, Volume 44, No. 43, Page 11999.

[16] Pre-trial Order, Stipulations of Fact No's 15 & 16.

tion which was sought by the Plaintiff, is administered by and is an integral part of Mitchell Memorial Library.[17]

Turning to the actual applicants for the profession librarian position in question, both for previous vacancies (1977) and the vacancy the Plaintiff sought to fill in 1980, the evidence establishes that overall, 11 of 16 female applicants (69% and 9 of 9 male applicants[18] (100%) had the ALA-MLS Degree - this, notwithstanding the fact that the degree was published as required and thus potential female applicants not having the degree were chilled or discouraged from applying! Again, disparate impact is self evident.

SUMMARY

In summary, there are numerous reasons in evidence that the ALA-MLS degree was not a business necessity at Mississippi State University. Non ALA-MLS employees were performing as well or better in equivalent jobs. At least twenty percent of academic librarys don't require the ALA-MLS degree for entry level librarian positions. Mississippi State University, in fact, quit requiring the ALA-MLS degree after only having done so for two of its more than one hundred years of existence.[19] In spite of this fact, Defendant's witnesses described Mitchell Memorial Library at Mississippi State University as one of the best in the Southeast. Had not the Fifth Circuit Court of Appeals chosen to apply its maverick "just better" standard, the Defendants would have had to show why the

---

[17] Pre-trial Order, Stipulations of Fact No. 5.

[18] Pre-trial Order, Stipulations of Fact No. 63, 64 & 65.

[19] The ALA-MLS was discontinued as a minimum requirement shortly after Plaintiff filed her Cause of Action.

ALA-MLS degree requirement was a business necessity. This they could not have shown under the evidence elicited at the trial.

Regarding business necessity, the Plaintiff demands that she be only required to meet only the burden of proof established by the U.S. Supreme Court, and none other. The departure by the Fifth Circuit Court of Appeals from the accepted and usual course of judicial proceedings by applying its clearly erroneous standard of review in an inappropriate manner, calls for an exercise of power of supervision of the United States Supreme Court.

George McKee
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, George McKee, one of the Attorneys of record for Plaintiff, Glenda Merwine in this cause, do hereby certify that I have, this day mailed, postage prepaid, a true and exact copy of the above and foregoing Petition for Writ of Certiorari and the Appendix, thereto, to the following designated Attorneys opposite or having made appearances in this cause:

William H. Ward and H. Russell Rogers, II
P.O. Box 59
Starkville, MS. 39759

Ed Davis Noble, Jr.
Asst. Atty. Gen.
P.O. Box 220
Jackson, MS. 39205

James S. Whitehead and Mary Hutchings Reed
One First National Plaza
Chicago, Ill. 60603

So CERTIFIED this the _____ day of June, 1985.

_____

George McKee